87-3501

NO:

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOSEPH CIANCAGLINI,

Petitioner,

vs:

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT

JURISDICTIONAL STATEMENT

Joseph Ciancaglini
Petitioner, Pro se
31458-066
P.O. Box 901
Ray Brook, N.Y. 12977

June 30, 1987

QUESTIONS PRESENTED FOR REVIEW

ISSUE I:

WHETHER the lower courts have interpreted the issue of inadequate and ineffective assistance of counsel attributes of a proper defense, in the case at bar, in a manner inconsistent with this Court's ruling in " STRICKLAND v. WASHINGTON, 466 U.S.668, 80 L. Ed. 2d 674 (1984).

ISSUE II:

WHETHER the provisions of 18 U.S.C. 1961(5) prohibit the government from introducing testimony or evidence related to predicate offenses or overt acts which occurred outside the five (5) year statute of limitations, in a RICO conspiracy charge, absent a showing that the predicate offenses or evidence thereof was the subject of a prior conviction.

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No._____

In The

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JOSEPH CIANCAGLINI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Justices of the Supreme Court of the United States of America:

Joseph Ciancaglini the petitioner, in proper person, respectfully asks that a Writ of Ceritorari issue to review the judgment and opinion of the United States Court of

Appeals for the Third Circuit entered in the above entitled proceeding on February 5, 1987.

OPINION BELOW

Petitioner is unable to cite the reported ruling of the United States Court of Appeals for the Third Circuit in the case at bar.

The ruling is attached to this petition as APPENDIX B.

JURISDICTION

The ruling of the United States Court of Appeals for the Third Circuit was filed on 5 February 1987. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth and Sixth Amendments to the United States Constitution are involved.

STATUTORY PROVISIONS

Title 28 U.S.C. section 1961(5) is directly involved.

BEST AVAILABLE COPY

STATEMENT OF THE CASE

The case at bar involves a charge under 18 U.S.C. 1962(d) (RICO) that 23 individuals conspired, as an illegal association in fact, i.e., an illegal enterprise to conduct or participate directly or indirectly in the conduct of such enterprise's affairs "through a pattern of racketeering activity or collection of an unlawful debt", in violation of 18 U.S.C. 1962(c). The 23 individuals were charged with having commited a mass of diverse racketeering acts, within the meaning of 18 U.S.C. 1961(1) over a six year period of time, from January 1972 thru June 1978. In addition, the 23 individuals were charged with commiting41 separate overt acts in furtherance of the alleged conspiracy. Seven of the originally charged individuals, including the petitioner, were brought to trial under the aforesaid charges. Count I set forth the RICO conspiracy in which all defendants were charged; it cited eight

predicate offenses and forty-one overt acts committed in furtherance of the RICO conspiracy. Count II charged the petitioner and another defendant with the violation of federal gambling statute 18 U.S.C. 1955, which the petitioner was ultimately acquitted of. Count III charged the petitioner and three other defendants violating the same gambling laws. Trial lasted approximately one month; during the course of the trial the government was unable to show a single racketeering predicate offense in which all the defendants participated together; further, they were unable to show any one single predicate offense in which all of the alleged co-conspirators participated. The illegal enterprise theory was the linchpin through which the government sought to tie together separate and distinct acts of racketeering and separate and distinct defendants who had allegedly committed the acts of racketeering.

During the course of the trial the government introduced testimony and evidence related to alleged predicate offenses and overt acts, attributed to the RICO conspiracy which were time barred under 18 U.S.C. section 3282. As related to the petitioner, the bulk of this evidence and testimony formed the government's foundation for inclusion of the petitioner in the RICO conspiracy. At no time, prior to, during, or in post trial motions, did defense counsel raise the statute of limitations as a bar to the jury's consideration of any testimony or evidence related to the alleged overt acts or predicate offenses barred under the provisions of 18 U.S.C. 3282. Defense counsel failed to interpose an objection even when the trial Judge charged the jury that it could consider collection of an unlawful debt, time barred under 18 U.S.C. 3282, after having earlier instructed the jury that it could not consider that offense if it occur-

red more than five years before the return of the indictment.

A timely appeal was filed to the United States Court of Appeals for the Third Circuit and the judgment of conviction was affirmed on May 10, 1982. In that appeal, defense counsel did challenge the jury's consideration of collection of an unlawful debt inasmuch as that alleged predicate offense had occurred more than five years prior to the return of the indictment; however, the Court of Appeals ruled that the petitioner could not raise the issue on appeal because no request had been made for withdrawal of that predicate offense from the jury's consideration, nor had the issue been raised in petitioner's motion for judgment of acquittal, U.S. v. CIANCAGLINI, 709 F. 2d 214, 229.

A petition for a writ of certiorari was taken to this Court. The petitioner does not have the citation number. It was denied.

On 31 December 1985, the petitioner filed a Motion to Vacate and set aside judgment and sentence under 28 U.S.C. 2255. In part, the motion contained the following allegations:

1. Trial Counsel failed to object to jury's consideration of predicate offenses which occurred more than five years prior to the return of the indictment.

2. Defense counsel failed to object to that portion of the trial judge's charge which permitted the jury to consider such evidence in determining whether defendant had conspired to violate the RICO Statute.

3. Defense counsel failed to object to the inconsistency in the Court's charge regarding the jury's consideration of evidence of defendant's participation in the collection of an unlawful debt.

4. Defense counsel failed to request that the jury be charged that it could not consider evidence of a predicate offense which occurred more than five years prior to the return of the indictment, unless the offense was the subject of a conviction.

On 4 June 1986, the trial Court held a

hearing on the merits of the 2255 Motion. On 13 June 1986, the trial Court, in a written opinion, denied the petitioner's 2255 Motion. Said opinion is attached as APPENDIX A.

Notice of Appeal was filed, in a timely manner with the United States Court of Appeals for the Third Circuit. On 5 February 1987, the United States Court of Appeals for the Third Circuit affirmed, without opinion, the ruling of the trial Court.

REASONS FOR GRANTING THE WRIT

ISSUE I:

Review of the case at bar clearly indicates that the lower court rulings are inconsistent with this Court's ruling in the case of STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984).

In order to support a showing of inadequate representation, the petitioner demonstrated the failure of defense counsel to exercise and utilize the requisite skill and knowledge of his profession as it impacted in the research, presentation and argument in the case at bar.

Under Count I of the indictment, the petitioner was charged with overt acts and multiple predicate offenses, many of which took place outside the statute of limitations, as a foundation for conviction of the RICO conspiracy violation; thus, this charge placed defense counsel on notice that the provisions of 18 U.S.C. 3382 would be part

of any defense to be offered. In the case at bar, defense counsel committed a patent violation of the duty owed the petitioner by his failure to assure that the jury would not be permitted to convict upon evidence of time barred predicate offenses, whether by was of motion to strike, motion in limine,, evidentiary objection, request for jury instruction, or request for use of a special jury verdict form. Defense counsel had multiple opportunities before trial, during trial and even at the close of the government's case in chief, to insure that petitioner's rights were protected; however, defense counsel failed to act to protect the petitioner's interests at all points, even after the trial judge alerted counsel of the possibility of a statute of limitations defense by charging the jury that they could not consider evidence of collection of an unlawful debt if the alleged predicate offense occur- more than five years prior to the return of

the indictment. Even more shocking was defense counsel's statement, at the 4 June 1986 hearing that he did not know that collection of an unlawful debt was covered by the provisions of 18 U.S.C. 3282 and that it was not part of the definition of racketeering activity under 18 U.S.C. 1961(1). "

Review of the trial transcript, in the case at bar, clearly indicates that the government spent considerable time and effort to impress upon the trial jury the magnitude of involvement, by the petitioner, in the unlawful debt collection issue. This issue became the central foundation for the RICO conspiracy involvement under Count I as related to the petitioner. Yet, the testimony and evidence of the Wilmerton debt was time barred by 18 U.S.C. 3282, having occurrred more than five years prior to the return of the indictment. Yet, defense counsel failed to research the law, failed to argue the proper defense and failed to file proper

post trial motions. Because of the complexity of the case, the need for the government to utilize evidence, time barred by law, to prove the conspiracy issue, the failure of defense counsel to adequately research and defend on the issue denied the petitioner a fair and impartial trial. The emphasis placed upon the time barred evidence and testimony, by the government, in proving the conspiracy theory clearly indicates that a proper defense was material to a fair trial; and that a ruling that the government was prohibited from utilizations of this evidence and testimony would result in a different verdict.

REASONS FOR GRANTING THE WRIT

ISSUE II:

Presented for review, to the trial Court, by Motion under 28 U.S.C. 2255, was the argument that 18 U.S.C. 1961(5) prohibits the government from utilization of any evidence time barred under 18 U.S.C. 3282 in the prosecuting of a RICO conspiracy case absent a showing that such evidence related to a conviction. The trial Court rejected this argument. The United States Court of Appeals for the Third Circuit's ruling, without opinion, has prevented the clarification of an important question of federal law which should now be undertaken by this Court.

The government, in the case at bar, and in a general sense, has argued that utilization of evidence of alleged predicate offenses, outside the five (5) year statute of limitations, as controlled by 18 U.S.C. 3282, is permissable as long as a conspiracy, under 18 U.S.C. 1962(d) is found to have extended

into the five year statute of limitations of the indictment. In this regard, the petitioner contends that a consistent reading of all statutes relating to RICO related crimes requires the prohibition of the use of any evidence related to alleged predicate offenses, in a RICO conspiracy, outside the five year statute of limitations, absent a showing of conviction for the predicate offense charged.

In the case at bar, the indictment charged at least two predicate offenses and many overt acts taking place and ending at least five years prior to the return of the indictment. These offenses and acts became the major foundation for proof that a RICO conspiracy existed in the presentation of the government's case in chief. By application of 18 U.S.C. 3282, these issues were foreclosed from review by a court of law. However, evidence was presented, in the case at bar, which supported the government's case

that these predicate offenses took place and that the petitioner was involved in the overt acts leading up to the actual predicate offenses. The jury was permitted to deliberate upon this evidence as elements of the overall charge of conspiracy under 18 U.S.C. 1962(d). The petitioner submits that the principle of collateral estoppel is present in cases, such as this, where the government seeks, by back door methods, to litigate alleged crimes that they have been foreclosed from prosecuting under the provisions of 18 U.S.C. 3282. In the case at bar, the government has contended that the mere proof of agreement is sufficient to convict under RICO if the agreement is shown to extend into the limitation period for the crime. The petitioner contends that if a predicate offense is prohibited from litigation under 18 U.S.C. 3282, a conspiracy, or agreement

to commit the conspiracy would likewise be prohibited, if the acts were prior to the time frame outlined outlined under 18 U.S.C. 3282.

A review of the legislative history of 18 U.S.C. 1962, shows that the Attorney General sought, in his original request for „ legislation, to extend the statute of limitations in relation to RICO related crimes. Section (e) of 18 U.S.C. 1962 was suggested for this purpose. However, when the final legislation was enacted, this proposed section was eliminated. Congress' intent not to extend the statute of limitations in RICO cases, married with 18 U.S.C. 1961(5) which specifically excludes time spent in prison for prior acts of racketeering activity in tolling the overall ten year time frame in the RICO Act, clearly amplifies the petitioner's argument that the government, in attempting to prove a conspiracy, may not utilize evidence alleged to have occurred outside the five year statute of limitations,

absent a showing of prior conviction based upon the evidence to be offered. This prohibition is consistent with the collateral estoppel doctrine. To request a jury to reach a conclusion on facts which they would be barred from evaluating at an independent trial violates the principle of collateral estoppel; however, when such evidence is based upon a prior conviction, this contradiction does not exist. Petitioner submits that he was denied a fair and impartial trial by the government's use of evidence and testimony time barred under the provisions of 18 U.S.C. 3282.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted

Joseph Ciancaglini, Petitioner
Pro se # 31458-066
P.O. Box 901
Ray Brook, N.Y. L2977

PROOF OF SERVICE

I do state that I have this date sent, by regular U.S. Mail, a true and correct copy of the attached Petition for Writ of Certiorari, to counsel for the respondent at the following address:

ATTORNEY GENERAL
UNITED STATES OF AMERICA
U.S. DEPARTMENT OF JUSTICE
10th and PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20530

SIGNED this 30th day of June 1987, under penalty of perjury.

Joseph Ciancaglini,
Petitioner, Pro se

Prepared by
John C Crow

APPENDIX A

OPINION OF THE TRIAL COURT

IN THE UNTED STATES DISTRICT COURT

FOR THE EASTER DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

V. : Criminal No. 81-00049-04

JOSEPH CIANCAGLINI :

FINAL ORDER

AND NOW, this 13th day of June, 1986, upon consideration of defendant's motion for new trial, made pursuant to 18 U.S.C. 2255, for alleged ineffective representation of counsel at the time of trial, the Government's response thereto, and oral arguments on June 4, 1986, it is hereby ORDERED that defendant's motion is DENIED.

1. Defendant contends that he is entitled to a new trial because his attorney, Robert Simone, Esquire, failed to object to an arguably erroneous jury instruction. The instruction was that the alleged Russell

Wilmerton debt collection that constituted the predicate act, if proven, could suffice to satisfy the "collection of unlawful debt" element of the RICO conspiracy charge (Count I). Defendant argues that the court should have instructed that any act of collection of unlawful debt must have occurred within five years of the date of indictment. The alleged Russell Wilmerton incident occurred more than five years before the indictment was returned. The jury was instructed that the statute of limitations on collection of unlawful debt was five years (Jury Charge, May 4, 1982, N.T.86). Later in the charge, after discussing various racketeering acts and then the Wilmerton incident as "collection of debt by extortionate means," the court told the jury

> So to prove Ciancaglini's membership in the conspiracy, the Government must prove beyon a reasonable doubt that he agreed to commit any

two of these particular racketeering acts or agreed to the collection of an usurious debt from Russell Wilmerton.

(Jury Charge, May 4, 1982, N.T. 116).

On direct appeal, the Court of Appeals for the Tird Circuit found an arguable contradiction on the instruction as to the time period applicable to collection of unlawful debt since the Wilmerton event occurred more that five years before the indictment. United States v. Riccobene, 709 F. 2d 214, 229 (3d Cir.) cert. denied, 464 U.S. 849, (1983). Without deciding that there was an inconsistency or that it was material, that Court concluded that the failure of counsel to object waived the issue for appeal. Id.

This court rejects the 2255 claim of ineffective assistance of counsel as to the waiver because:

a) The jury was specifically and clearly instructed that any actionable collection of unlawful debt

had to be found to have occurred within five (5) years of the date of the indictment and the subsequent reference to the Russell Wilmerton event is not referenced by date in the charge;

b) There was overwhelming evidence that the collection of unlawful debt was one of the objects of the conspiracy and continued into the period of the statute of limitations.

It was not necessary for conviction that the defendant have committed personally the predicate act. United States v. Adams, 759 F. 2d 1099, 1116 (3d Cir.), cert. denied 106 S. Ct. 275 and 106 S. Ct. 336 (1985);

c) Although he was acquitted of the Racketeering act alleged as the "Reed Street Craps Game," defendant was found guilty of the substantive offense (Count 3) of illegal numbers lottery which was alleged

as part of the RICO count and necessarily included the collection of unlawful debt, i.e., debts incurred and contracted in gambling activity which were incurred in connection with the business of gambling; and

d) The reference to the Russell Wilmerton incident was reasonably understood by the jury as a racketeering act of collection of debt by extortionate means.

2. Defendant contends that the failure of Mr. Simone to request that the jury be charged that it must find the commission of an overt act within the period of the statute of limitations is DENIED as frivolous. No such instruction was required as a matter of law. United States v. Pepe, 747 F. 2d 632, 645 n. 8, 649 (11th Cir. 1984). Moreover, the court did charge that proof of an overt act as alleged during the existence of the conspiracy had to be proven. The evidence was clear that the conspiracy continued well into the statute of limitations of

five years before the return of the indictment.

3. Defendant contends that Mr. Simone erred prejudicially in failing to request that the court submit a special verdict form to the jury whereby guilt or innocence as to the specific alleged overt acts could have been determined. Failure to do so was a tactical decision and was consistent with the state of the law and preservation of defendant's post-trial interests. Further, in a RICO count, a court is not required to submit a special verdict form. See Riccobene, 709 F. 2d at 228. This court was moved to do so by the Government, but, in its discretion, denied the motion.

BY THE COURT:

SIGNED

J.

APPENDIX B

RULING OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 86-1417

UNITED STATES OF AMERICA

v.

JOSEPH CIANCAGLINI,

Appellant

(Criminal No. 81-00049-05)

DISTRICT JUDGE: Honorable James T. Giles

Submitted February 4, 1987

BEFORE: SEITZ, STAPLETON and MANSMANN,

Circuit Judges.

JUDGMENT ORDER

The court havin considered appellant's contention that he was denied the effective assistance of trial counsel and having considered on the basis of the record and the

decision on the direct appeal that dispite the deficiency in the professional performance of his trial counsel, there is no reasonable probability that but for counsel's unprofessional errors, the result of the trial would have been different, Strickland v. Washington, 466 U.S. 668, 694 (1984), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____
Circuit Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: FEB. 5, 1987